No. 16,199

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES BURTON ING and
RAYMOND WRIGHT,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court, District of Alaska, Third Division.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

On October 29, 1957, the appellants were indicted by the Grand Jury for the Third Judicial Division, District of Alaska, along with Charles E. Smith, John Walker, Dewey Taylor and Lemuel Ashley Williams, in a twenty count indictment charging the defendants with uttering and publishing forged checks in violation of section 65-6-1 ACLA 1949 (R 3-33). The appellants were named in each of the twenty counts of the indictment. The trial of the appellants was completed on February 28, 1958, at which time appellant

Ing was found guilty on each of the twenty counts (R 34-35) and appellant Wright was found guilty on Counts VI through XVIII of the indictment and acquitted on the remainder of the charges (R 35-37).

On March 5, 1958, appellant Ing was sentenced to fifteen (15) years on each of the twenty counts of which he had been convicted, the sentences to run concurrently, and appellant Wright was sentenced to serve twelve (12) years on each of the thirteen counts of which he had been convicted, his sentences also to run concurrently (R 37-40).

The District Court had jurisdiction of the indictment and of the trial by virtue of the provisions of Sections 53-1-1, 53-2-1, and 65-6-1 of the Alaska Compiled Laws Annotated, 1949. Jurisdiction is conferred on this Court by Sections 1291 and 1294, Title 28 U.S.C.

STATEMENT OF FACTS AND PROCEDURE.

The principal witness called by the prosecution in its case against the appellant Ing was Claude Kenneth Brownfield, of Chicago Ridge, Illinois, who was at that time under a five count indictment for possessing forged checks and as a habitual criminal. Brownfield stated, as a witness, that he first became acquainted with appellant Ing sometime the latter part of February or early part of March, 1956, when Brownfield was introduced to Ing in a tavern in Chicago, and that during the ensuing two weeks, conversations were held concerning appellant Ing's attempt to get some-

thing lined up in the form of checks in Alaska (R 477-478). At this time Brownfield stated to Ing, in response to Ing's query, that he would be interested in taking part in such activity. Ing informed Brownfield that he would contact him about the matter later.

Sometime during the months of April, May, June and July of 1956, Brownfield received one or two letters from Ing with instructions as to the time he and others were to arrive in Fairbanks, Alaska, that he would be contacted by a friend of Ing's in Chicago who would give to Brownfield the checks they were to "pass", and that he should contact two friends in Peoria by the names of Hausam and Eckley (R 479-480). These letters were later destroyed by Brownfield.

Brownfield related that, in accordance with the instructions contained in Ing's letters, a package was delivered to him by a fellow he did not know and that this package contained a check protector, two birth certificates, and approximately four hundred checks that appeared to be Morrison-Knudsen payroll checks. These items were brought to Alaska by Brownfield, in the company of Mr. Eckley and Mr. Hausam, when they flew to Fairbanks and were then delivered to appellant Ing, approximately August 27, 1956. The checks which were delivered to Brownfield and later by him to Ing, appeared to be Morrison-Knudsen payroll checks, drawn on the First National Bank of Anchorage, signed by Guy M. King and listed the home office as Boise, Idaho. Appellant Ing showed Brownfield a genuine Morrison-Knudsen payroll

check and pointed out to Brownfield the difference in the two (R 481-483).

During this same conversation between Brownfield and appellant Ing, Ing informed the witness how the checks were to be passed over the Labor Day week-end and what Brownfield was to do after passing the checks. Ing and Brownfield then typed in the names and the amounts of the checks and ran them through the check protector. Also at this time, Ing took a picture of Brownfield and pasted it onto an identification card which identified him as Charles Lappa and was given to Brownfield to use in passing the checks. The birth certificates (R 485), the identification card (R 487) and driver's license (R 488) were introduced into evidence and the appellee's exhibits, one through nineteen and twenty-one were identified by the witness as being those brought to Alaska by him (R 491).

George W. Hooker, Assistant Hotel Manager at the Westward Inn, Anchorage, was called as a witness by the appellee who testified that on the 31st day of August 1956, their business records indicated that there was registered at the Westward Inn, 5th and Gamble, Anchorage, Alaska, James Ing and wife, Fairbanks (R 456). M. E. Dankworth, relating the admissions of Charles E. Smith, testified that Smith had stated that upon his arrival in Anchorage, he and Mr. Volk had stopped at the Westward Inn, where they parted company, then Smith had proceeded to a nearby bar to wait for Mr. Volk, and then a short time later Mr. Volk arrived at the bar with a bag, two packages of M-K checks and an identification card

which he had seen in Fairbanks, and upon which the picture of him that had been taken by Ing was pasted (R 408-409).

Defendant John Walker, called by the appellee, testified that on or about the 11th day of August, 1956, he had a conversation with appellant Wright who asked if he, Walker, would be interested in "trying to make some big money" to which he replied that he would (R 414-415). On the 29th day of August, Walker was again in the company of Wright when appellant Ing came by the building Walker was working on for Wright, picked up Wright and drove off. Approximately twenty-five to thirty minutes later Wright returned and stated to Walker that everything was okay (R 416). Subsequently, at the Beachcombers, Ing took a picture of Walker which was pasted on an identification card. This card was later returned to Walker when he arrived in Anchorage the Labor Day week-end (R 418), in the company of appellant Wright and defendant Taylor.

Upon the arrival in Anchorage, defendant Taylor and Walker stayed at a residence on 18th Street while appellant Walker stayed at the residence of Eli Williams (R. 374-419). The next morning, (Saturday) appellant Wright picked up Taylor and Walker, had breakfast, and drove to Fifth and Gambell where Wright got out of the car and went in the hotel. Then he came out and he had a package containing an identification with Thomas A. Brown on it, which was given to Walker along with some checks by Wright. The identification card was the

same as the one made at the Beachcombers in Fairbanks (R 421). Detailed statements as to the procedure of passing the checks was then elicited from the witness as were statements pertaining to the return trip to Fairbanks (R 419-427). Walker further testified the money obtained from the checks was given to Wright in Anchorage. However, the items purchased at the time the checks were passed were transported to Wright's house in Fairbanks. At that time Wright gave Walker approximately fifteen hundred dollars ($1500.00) of the money illegally obtained in Anchorage, as a result of the passing of false and forged checks (R 423-427-428).

Both appellants moved for judgments of acquittal at the close of the Government's evidence; however, the Court reserved decision (R 564-565). All defense counsel rested their cases, closing arguments were had and the case was submitted to the jury, who returned verdicts of guilty.

These appeals followed the verdicts of the jury, judgments, and sentences of the Court.

ARGUMENT.

I.

A. AND B. THERE IS AMPLE EVIDENCE TO CORROBORATE THE TESTIMONY OF THE ACCOMPLICES, THEREFORE, THE COURT DID NOT ERR IN REFUSING TO GRANT MOTIONS FOR JUDGMENTS OF ACQUITTAL.

The appellee will concede that the witnesses Taylor and Walker were accomplices within the meaning of Section 66-13-59 ACLA 1949 which reads as follows:

> "That a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission."

The appellee does not concede that witness Brownfield was an accomplice within the purview of the statute. This is discussed in detail under part C of this same heading. If this Honorable Court agreed with the contention of the appellee that witness Brownfield was not an accomplice, then there can be no question as to the sufficiency of the corroboration. If this Honorable Court is of the opinion that the witness Brownfield was an accomplice within the purview of the statute there is ample corroboration.

George W. Hooker, assistant manager of the Westward Inn at Anchorage, testified that appellant Ing was in the Anchorage area and had stayed at his hotel from August 31, 1956, through September 2, 1956, and testified as to a long distance telephone call made by the appellant Ing (R 455-457). Proof of

defendant's presence near the scene of the crime constitutes sufficient corroboration when it tends to connect the defendant to the offense and identifies the accused as the criminal the accomplice says he is. *State v. Harmon,* ..... Mont. ....., 340 P. 2d 128 (1959); *Tidewell v. State,* 37 Ala. App. 228, 66 So. 2d 845; *Fries v. People,* 80 Colo. 430, 252 Pac. 341; *Harper v. Commonwealth,* 211 Ky. 346, 277 S.W. 457; *Smith v. Commonwealth,* 242 Ky. 399, 46 S.W. 2d 513; *Moore v. State,* 30 Ala. App. 304, 5 So. 2d 644. Witness Brownfield testified appellant Ing gave him an identification card and a driver's license to be used in cashing the checks in the Fairbanks area (R 486-488). The driver's license was admitted in evidence as Government Exhibit No. 28 (R 488). (Appellee's exhibit No. 1.) Physical examination of the driver's license with the naked eye reveals that the name "James B. Ing" had been partially erased as the name of the party to whom the license had been issued, and the name Charles Wright filled in. Slight evidence, identifying the defendant with the commission of the crime, will corroborate the testimony of the accomplice. *People v. Taylor,* 70 Cal. App. 239, 232 Pac. 998; *People v. Baillie,* 133 Cal. App. 508, 24 Pac. 2d 528; *Gibson v. State,* 84 Ga. App. 417, 65 S.E. 2d 818.

Eli Williams testified that appellant Wright was in the Anchorage area and stayed in his home over the Labor Day week-end of 1956 (R 371). Ernest Yokeley testified that he was present in the home of Eli Williams and at that time appellant Wright, John

Walker, Dewey Taylor, co-defendants in this case, were also present (R 556). In determining whether the testimony of the accomplice is sufficiently corroborated, the defendant's entire conduct may be considered. *People v. Griffin,* 98 Cal. App. 2d 1, 219 Pac. 2d 519.

C. THE WITNESS BROWNFIELD WAS NOT AN ACCOMPLICE AS A MATTER OF LAW AND THE QUESTION WAS PROPERLY SUBMITTED TO THE JURY UNDER PROPER INSTRUCTIONS.

The Alaska Court has already ruled on the test to be applied in determining whether a party is an accomplice within the meaning of the Alaska Statute. In *Ex parte Jackson,* 6 Alaska, 726, Judge Reed at page 730 said:

> "The great weight of authority is to the effect that an accomplice is one who aids or abets or encourages the crime of which defendant is accused, and the usual test by which to determine whether one is an accomplice is whether or not he could be indicted and punished for the crime with which defendant is charged, or, as it is sometimes expressed, whether his participation in the offense was criminally corrupt."

This instruction has been approved by this Honorable Court. *Stephenson v. U. S.,* 211 F. 2d 702 (9th Cir. 1954.) This is the law that is followed in most jurisdictions. *State v. Durham,* 75 N.W. 1127 (Minn. 1898); *Levering v. Commonwealth,* 117 S.W. 253 (Ky. 1909); *People v. Hrdlicka,* 176 N.E. 308 (Ill. 1931).

The Alaska Statute which the appellants are alleged to have violated is 65-6-1 ACLA 1949. The Statute

designated two crimes, that of forgery and that of uttering. These are separate and distinct crimes. *Wiley v. U. S.*, 144 F. 2d 707 (9th Cir. 1944); *DeMaurez v. Squier, Warden,* 144 F. 2d 564 (9th Cir. 1944).

The relation between the forger and the one passing the forged instrument knowing it to be forged is like that existing between a thief and one receiving the property knowing it to be stolen. It has been held that one is not an accomplice to the other. In this case there was no aiding and abetting between Brownfield and appellants, nor was there mutual consent or knowledge for the specific acts of uttering and passing the forged checks which would be essential to classify them as accomplices. *State v. Phillips,* 127 Mont. 381, 264 P. 2d 1009.

The evidence discloses that the witness Brownfield participated with the appellant Ing and with uttering some of the forged checks in the Fairbanks area, but had no connection with the uttering scheme in the Anchorage area, the crime for which the appellants were indicted and had been convicted. Applying the testimony set out in *Ex parte Jackson,* supra, it is obvious that the witness Brownfield could not, as a matter of law, be ruled to be an accomplice. It is true that Brownfield had some general knowledge of the Anchorage operation and that perhaps he was morally delinquent in not exposing that scheme. However, evidence of Brownfield's participation in the crime of uttering in the Anchorage area in any material way does not exist.

"The burden of proving the witness to be an accomplice is, of course, upon the party alleging it for the purpose of invoking the rule, namely, upon the defendant. Whether the witness is in truth an accomplice is left to the jury to determine and if they conclude him to be such, then and only then are they to apply the rule requiring corroboration."

Wigmore on Evidence, 3rd Edition, Vol. 7, Sec. 2060, (e) page 341;

State v. Akers, 74 P. 2d 1138 (Montana 1938);

Ripley v. State, 227 S.W. 2d 26 (Tenn. 1950);

Darden v. State, 68 So. 550 (Alabama 1915).

In the present case, the appellants failed to show by the evidence that the witness Brownfield was an accomplice. From the prosecutor's evidence and Brownfield's testimony, Brownfield could not be ruled to be an accomplice as a matter of law. The appellants put on no evidence to show he was an accomplice. Whether the witness was an accomplice was properly submitted to the jury under proper instructions and their determination is and should be final.

II.

THE UNITED STATES ATTORNEY DID NOT COMMENT ON THE FAILURE OF THE APPELLANTS TO TAKE THE WITNESS STAND AND THE COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY CONCERNING THE REMARKS OF THE UNITED STATES ATTORNEY.

At page 271 of the Smith transcript (U. S. Court of Appeals for the Ninth Circuit, No. 16,041) you will

find the following comments of the United States Attorney made in final argument:

> "Now, there's also much innuendo about the reliability of the Government's evidence. I say, and you know, it's the only evidence you have. If they didn't feel that it was reliable, why didn't they put on some evidence? Why didn't they put some evidence on? You have no choice; you have no evidence or no testimony other than that adduced by the Government witnesses, and by the Government. . . .
>
> Mr. Kay. I hesitate to interrupt Mr. Plummer's argument, but I want to register an objection to that line of argument as tending to violate the constitutional right the defendant may have.
>
> The Court. Well——
>
> Mr. Plummer. I didn't mention anybody, except why didn't they put on a defense?
>
> The Court. That is correct. Objection overruled. If it had referred to an individual, then I would concur, Mr. Kay.
>
> Mr. Kay. They refer to the three individuals at this counsel table and no one else.
>
> The Court. Of course, that is true.
>
> Mr. Plummer. I didn't say . . . may counsel approach the bench a moment?
>
> The Court. I don't think it is necessary, counsel. Let's proceed.
>
> Mr. Plummer. Fine. Now, also, I think . . ."

No requested instructions to disregard the comments of the District Attorney was made by any of the counsel.

The comments of the District Attorney could not be construed as a comment on the failure of the appel-

lants to take the stand. Any error that was induced was induced by the comments of the counsel for the defendant Ing, in calling to the Court's attention in the presence of the jury that the comment referred to the three defendants. It appears that the attorneys for the three co-defendants agreed and the Court approved that the objection of one counsel would constitute objections for the three defendants on trial (R 57) (U.S. Court of Appeals for the Ninth Circuit No. 16,041). An examination of the authorities in this area would seem to indicate that the remarks of the United States Attorney in this instance would be proper. *Johnson v. United States,* 5 F. 2d 471, 475 (4th Cir. 1925); *Slakoff v. United States*, 8 F. 2d 9, 11 (3rd Cir. 1925); *Lias v. United States,* 51 F. 2d 215, 218 (4th Cir. 1931); *Morgan v. United States,* 31 F. 2d 385, 388 (7th Cir. 1929); *Lefkowitz v. United States,* 273 Fed. 664, 668 (2nd Cir. 1921); *Jackson v. United States,* 102 Fed. 473, 487 (1900); *Bilodeau v. United States,* 14 F. 2d 582, 586 (1926); *Robilio v. United States,* 291 Fed. 975, 985 (6th Cir. 1923).

In the instant case, the Government evidence was uncontradicted in all aspects. The comments of the District Attorney merely called attention to this fact. Nowhere was there any reference made to the failure of the appellants to testify. There is no showing by the appellants that the only evidence available to rebut the Government's case would have to come from him. The only adverse comments was that made by the counsel for the defendant Ing, who apparently at this point in the trial was acting for and on behalf of the

appellant. It has been held that the action of the defendant's counsel in misconstruing the comments of the prosecutor cannot be attributed to the Government. *State v. O'Brien*, 77 So. 2d 402, 405 (La. 1954).

CONCLUSION.

For the reasons stated, there was no prejudicial error committed at the appellants' trial. Therefore, the verdict of the jury and judgment of the trial court should be affirmed.

Dated, Anchorage, Alaska,
January 15, 1960.

Respectfully submitted,

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